BRIEF IN SUPPORT OF PETITION

I

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Whether a transfer in trust was made in contemplation of death is a question of fact (*Colorado National Bank of Denver et al.* v. *Commissioner,* 305 U. S. 23), a principle fully appreciated by petitioners. So too is the value of a gift at a particular date a question of fact, but the criterion to be employed for determining such value is a question of law (*Powers* v. *Commissioner,* 312 U. S. 259); and this Court is not bound by the finding of a lower court reached upon the application of erroneous legal standards (*Helvering* v. *American Dental Co.,* 318 U. S. 322), or upon the erroneous interpretation of the term "in contemplation of death" (*Colorado National Bank of Denver et al.* v. *Commissioner, supra*).

The statutory significance of the phrase "in contemplation of death" found in Section 302(c) of the Revenue Act of 1926, as amended, is fully discussed in *United States* v. *Wells,* 283 U. S. 102. In the *Colorado National Bank* case, this Court adhered to the principles of the *Wells* case. The *Colorado National Bank* case presents a striking similarity factually to the instant case. There the grantor, 5½ years before his death, when 80 years old and in good health, irrevocably conveyed securities of large value in trust under the provisions of which income should be accumulated during his life and after his death distributed in requested amounts to his daughter during her life, and corpus should be distributed to her descendants at her death. The Circuit Court of Appeals for the Tenth Circuit found that the grantor's dominant purpose was to

make provision for his descendants after his death in the event his speculations proved tragic and to place a substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death.

Here, Kroger, 10½ years before his death, when 68 years old and in good health, irrevocably conveyed securities of large value in trusts, retaining the income therefrom for his life and providing for distribution after his death of the income to his children during their lives and of the corpora to his descendants upon the death of his last surviving child. The purpose found by the Tax Court, implicitly approved by the Circuit Court of Appeals, was to bar his wife from any statutory rights in the transferred property in case the woman whom he was about to marry should survive him.

In its consideration of the *Colorado National Bank* case, this Court stated:

> "The court's opinion seems to rest upon an erroneous interpretation of the term 'in contemplation of death.' The meaning of this was much discussed in *United State* v. *Wells, supra.* We adhere to what was there said. The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more than this is required in order to show that a conveyance comes within the ambit of the statute."

In the *Colorado National Bank* case, the purpose of the grantor was to make certain that the trust property would be used after his death for his daughter and her children regardless of his intention to speculate in the stock market. In the instant case, the purpose of Kroger was to make certain that the trust property would be used after his

death for his children and their children regardless of his intention to remarry.

The similarity of the facts of these cases and the divergence of the conclusions reached amply demonstrate the erroneous interpretation of the term "in contemplation of death" by the courts below and the conflict with this Court's pronouncements.

II

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The question of Federal law is, if Kroger's irrevocable transfers of property in trust on February 13, 1928, at age 68, were made in contemplation of death, whether only to the extent of the interest therein then transferred by trust, namely, .69565, is the trust property, valued at the date of his death, includible in his gross estate.

Kroger retained an interest in the trust property consisting of income therefrom for his life; he transferred

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The attention of this Court is respectfully called to the importance of the question presented in this case, not only because of the amount involved (approximately $10,500,000 in tax and interest), but more particularly because of the effect of the decisions of the courts below upon the administration of the Federal estate tax statute. Already, The Tax Court of the United States has relied upon its decision and that of the Circuit Court of Appeals in this case and has held that a transfer in trust made by a woman, 19 years before death, when 57 years of age and about to be remarried, intended to prevent her prospective husband from attaining any interest in her estate as a statutory heir or any interest in her estate by courtesy and to protect the interest of her two children and their descendants in her estate in the event of her death prior to his death, was made in contemplation of death [Memorandum Opinion of the Tax Court entered January 3, 1945 in *Estate of Marion S. Gano, deceased, etc.* v. *Commissioner*, CCH Dec. 14,311 (M)]. Perhaps other cases involving substantially identical facts are pending.

The *Gano* case, if appealed, will go to the Circuit Court of Appeals for the Third Circuit; and in the event of a reversal, a conflict between circuits could bring the question before this Court. Failure of this Court to grant certiorari in this proceeding will cause the rights of the petitioners to be foreclosed in the event the *Gano* case reaches this Court and results in a contrary conclusion.

an interest therein consisting of income to his children for their lives and of corpus over to his granchildren upon the death of his last surviving child. As a result of his retained life interest, he received in cash $4,327,980.46 (R. 93, 96) which became a part of his gross estate. Under the decisions of the courts below, this retained life interest, namely, $4,327,980.46, as well as the entire value at date of death of the trust properties, namely, $12,197,904.40 (R. 74), is included in gross estate. This life interest was never transferred; it was obliterated by his death (*May* v. *Heiner,* 281 U. S. 238).

The extent of the interest transferred by trust, i. e., the quantum of his irrevocable inter vivos gift, was .69565 of the trust property ("Table A" of Sec. 81.10 of Estate Tax Regulations 105 and of Sec. 86.19 of Gift Tax Regulations 108; *Robinette* v. *Helvering,* 318 U. S. 184).

The courts below held in effect that Kroger's gift by trust was in contemplation of death. That gift should then be valued as at the date of his death. The gift was .69565 of the trust property. Therefore, its value at the date of death should be .69565 of the then value of that property.

The courts below failed to value the gift as at the date of death. Both courts applied the statute as though the words "to the extent of any interest therein" were not a part thereof. They included the value at date of death of the trust property as a whole. They failed to include that property in gross estate only to the extent of the interest therein, .69565, representing the gift.

We believe that the question here is an important question of Federal law, which has not been, but should be, settled by this Court.

Counsel for petitioners certify that in their opinion this petition is well founded and that it is not interposed for delay.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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